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Shutting Down the Texas Roadhouse Verdict Party (in part); The Texas Legislature Takes Aim at Nuclear Verdicts

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As many are aware, the Nuclear Verdict phenomenon (a "nuclear verdict" is described as a verdict of $10 million or more)—by which plaintiffs' personal injury counsel, propagating a sophisticated yet simultaneously primordial strategy known as the Reptile Theory, seek to vilify the trucking company as opposed to seeking recompense for actual damages—is an albatross around the proverbial neck of the motor carrier industry and the transportation broker sector. Nuclear verdicts have jumped over 300% in the past decade. Also, the average verdict size for a lawsuit involving a truck collision has increased from $2.3 million, to $22.3 million.

One of the hotbeds of the nuclear verdict battlefield has been the state of Texas. In fact, in Texas they say that 10 million is the new one million! Recent cases in Texas include a verdict against a motor carrier in the $100 million range (including $75 million in punitive damages) in a case in which the plaintiff told the officers at the scene that he was not hurt. Similarly, there have been at least 20 other nuclear verdicts in Texas in the last several years. State legislatures across the country are taking notice of this phenomenon, and its deleterious effects upon the transportation sector, and legislating accordingly. One of the first and most comprehensive laws, Texas House Bill 19, was recently enacted by the Texas legislature on a broad, *bipartisan* basis. That law serves to compartmentalize the trial process, and interjects various other procedural thresholds, to slow the nuclear verdict freight train in these cases. The hope is to put the brakes on the Reptile Theory by excluding evidence of industry-wide trends likely to bias juries against motor carriers (and brokers).

Right out of the box, Texas House Bill 19 splits the trial into two phases. The first phase deals only with the motor carrier's driver's fault and liability (truck malfunctions will also be addressed in phase one). Notably, this phase excludes unrelated allegations of unsafe motor carrier safety practices. In fact, it is possible that during phase one the jury may not even known the *name* of the motor carrier! The second phase allows plaintiffs to sue the carrier itself, but only *after* the motor carrier's *driver's* liability has been determined (*if* it is determined). So, phase two concerns liability under *respondeat superior* and the amount of punitive damages, *if any*. Consequently, in trial proceedings under this bifurcated process, the evidence, testimony, and, more importantly, arguments, intimations, and inuendo of plaintiffs' counsel are confined to actual facts of driver fault and liability and the common-law legal principles that relate to those facts. The bifurcation is not automatic though; it must be requested by a motion to the court, made within 120 days of the defendants answering the complaint-a *critical* docket date for motor carriers. This bifurcation mechanism thus effectively segregates that first phase from the more Reptilian second phase and should result in a dramatic

decrease in vilification of the motor carrier itself for practices that are completely unrelated to the underlying facts of the actual accident.

The statute also limits the admissibility of evidence of failure to comply with non-pertinent FMCSA regulations. Often in these cases, plaintiffs' counsel conduct exhaustive discovery into the smorgasbord of the motor carriers' policies and practices relating to FMCSA compliance, internal safety audits, maintenance programs, vehicle inspections, the company's "safety culture" as a whole, and a host of other overall operational facts, almost all of which typically have no direct bearing upon the facts underlying the accident at issue. They do this, with an aim toward demonizing the trucking company, by finding some fault in an unrelated policy or practice and attacking that instead of the actual accident itself and its causation. Texas House Bill 19 should also serve to dramatically limit that inflammatory practice.

Under the Act, evidence of the defendant motor carriers' failure to comply with an FMCSA regulation must be directly relevant to the accident. There are two criteria that must be met in order for evidence of the carrier's failure to comply with FMCSA regulations to be admissible: First, the regulation must apply to the action or omission *that caused the accident.* Then, a reasonable jury must be able to find that the failure to comply was the proximate cause of the accident (another threshold point ripe for pretrial evidentiary motions). Also, the regulation must specifically govern the causative conduct and be an element of the duty of care applicable for the defendant in this phase. However, if the evidence of the carrier's failure to comply is admissible, other evidence of similar failures are admissible *only if they occurred within two years of the accident*. Also, per the direct statutory language, the plaintiff must obtain a court order allowing such historic discovery if the plaintiff seeks evidence of past failures to comply within the two-year period. Those court orders are subject to review for abuse or discretion. As noted, these procedural restrictions should limit, even before the trial stage, the broad-based "gotcha" type of discovery often sought by plaintiffs' counsel in these cases.

This action by Texas legislature is a seminal one. It goes a long way to taking firm, concrete steps toward curbing abuses of the litigation and trial systems by plaintiffs' counsel. It helps to ensure that liability will be determined based upon the actual facts of the accident, actual proximate cause, and even comparative fault of the plaintiff without inflammatory, Reptilian strategies that have nothing to do with the accident itself. Unfortunately, it appears that the Act does not apply retroactively. Section 6 of the Act makes clear that "[C]hanges in law made by this Act only apply to an action commenced on or after the effective date of this Act, which is September 1, 2021." Consequently, any motor vehicle accident lawsuit filed in Texas after that date-the Nuclear Disarmament Date (NDD)-will be governed by the very logical, rational, measured strictures of this statute. So, expect a tsunami of filings before the NDD. It looks like the Texas Roadhouse verdict party is still open-but last call will come a lot earlier going forward!

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